

DOCKET FILE COPY ORIGINAL
BEFORE THE
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)

Promotion of Competitive Networks)
In Local Telecommunications Markets)

WT Docket No. 99-217

Wireless Communications Association)
International, Inc. Petition for Rulemaking to)
Amend Section 1.4000 of Commission's Rules)
To Preempt Restrictions on Subscriber Premises)
Reception or Transmission antennas Designed)
To Provide Fixed Wireless Services)

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Cellular Telecommunications Industry)
Association Petition for Rule Making and)
Amendment of the Commission's Rules)
To Preempt State and Local Imposition of)
Discriminatory And/Or Excessive Taxes)
And Assessments)

Implementation of the Local Competition)
Provisions in the Telecommunications Act)
Of 1996)

CC Docket No. 96-98

REPLY COMMENTS OF CINERGY CORP.

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Dated: September 27, 1999

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EXECUTIVE SUMMARY

In its Notice of Proposed Rule Making in this proceeding, the Federal Communication Commission (Commission) seeks comments on, among other matters, the scope of access to utility property granted by the Telecommunications Act of 1996.

Cinergy agrees with others providing comments that Congress did not intend to grant cable television systems and telecommunications carriers access to all property owned or controlled by utilities. The Commission is precluded from deviating from the unambiguous language of the statute, and is limited to granting access only to those specifically delineated classes of property.

Cinergy asserts that Winstar, in its comments to the Commission, severely misconstrued congressional intent in arguing that the Commission should adopt a more expansive definition of the term “right-of-way”. The Commission is inappropriately seeking to expand the scope of the Pole Attachment section of the 1996 Act. It seeks to extend the definition of “rights-of-way” to property owned by utility companies and used as part of its distribution system. The common use of the term “right-of-way” as the right to pass over the property of another cannot be reasonably interpreted to include the situation in which a utility uses property owned in fee simple in the manner of a right-of-way. Additionally, had Congress intended a more expansive definition of the term “right-of-way”, it would have made this clear in the legislation.

Finally, limiting the access granted to cable television systems and telecommunications carriers to true rights-of-way does not place further anti-competitive obstacles before these service providers.

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Of 1996)	

COMMENTS OF CINERGY CORP.

Pursuant to § 1.415(c)¹ of the rules of the Federal Communications Commission (Commission), Cinergy Corporation (Cinergy) respectfully submits its reply comments in

¹ 47 C.F.R. § 1.415(c).

response to the comments filed addressing the Notice of Proposed Rulemaking (NPRM) in the above-mentioned proceeding.²

INTRODUCTION

The Commission issued the NPRM in this proceeding to foster competition in local telecommunications markets.³ It has initiated this rulemaking proceeding to consider certain actions aimed at facilitating the development of competitive telecommunications networks. Specifically, the NPRM seeks to ensure that competitive providers will have reasonable and nondiscriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments. Cinergy is providing its reply comments to the Commission's inquiry urging the Commission to make dispositive its tentative conclusion that section 224 of the Communications Act⁴ does not confer a general right of access to utility property. Additionally, Cinergy asserts that the meaning of the term "rights-of-way" in section 224⁵ does not include land used for distribution facilities if it is held by the utility in fee simple absolute.

² In the Matter of Promotion of Competitive Networks In Local Telecommunications Markets, Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of Commission's Rules To Preempt Restrictions on Subscriber Premises Reception or Transmission antennas Designed To Provide Fixed Wireless Services, WT Docket No. 99-217, Notice of Proposed Rulemaking and Notice of Inquiry (Released July 7, 1999); Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules To Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes And Assessments, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Third Further Notice of Proposed Rulemaking (Released July 7, 1999) (the "NPRM").

³ See NPRM ¶ 1

⁴ 47 U.S.C. § 224, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act).

⁵ 47 U.S.C. § 224(f)(1)

BACKGROUND

Cinergy is one of the largest diversified energy companies in the United States and is the parent company of The Cincinnati Gas & Electric Company (CG&E) in Ohio and PSI Energy, Inc. (PSI) in Indiana. Together, these operating companies serve 1.4 million electric and 455,000 gas customers in Ohio, Indiana and Kentucky. Being a utility company under the definition provided in section 224 of the Communications Act⁶, Cinergy could be affected by any decisions the Commission makes with respect to the interpretation of the Communications Act.

Specifically, Cinergy has an interest in maintaining its right to exclusive use and possession of its corporate utility property. The Communications Act does not make such property subject to cable television system and telecommunication carrier access. Loss of Cinergy's right to exclusive use and possession of corporate utility property will adversely affect Cinergy's rate-payers, who will be forced to support a scheme for the placement of cable television system and telecommunication equipment that is less efficient than the current market-driven approach. The marketplace today functions as an effective and efficient means for enabling building owners, including utility companies, to reap fair market value for the leasing of property to cable television systems and telecommunications carriers. Should the Commission expand the scope of section 224 to provide cable television systems and telecommunication carriers with nondiscriminatory access to all Cinergy property, Cinergy and its rate-payers will suffer the loss of the fair market value of its property. Cinergy is providing these reply comments in order to preserve this interest.

DISCUSSION

I. CINERGY AGREES WITH THE KANSAS CITY POWER & LIGHT COMPANY THAT SECTION 224 DOES NOT CONFER A GENERAL RIGHT OF ACCESS TO UTILITY PROPERTY.

In its Comments to the Commission, the Kansas City Power and Light Company (KCPL) argues that the Pole Attachment Act is intended to grant telecommunications carriers and cable television systems the ability to “piggyback” along the distribution systems owned by utility companies⁷. They logically point out that the intent of this law is to reduce, if not minimize, the expense associated with the build-out of redundant distribution networks. In addition, KCPL recognizes the obvious congestion that would be caused by requiring individually constructed distribution networks to coexist.

KCPL argues convincingly that the need to minimize the expense and congestion associated with redundant distribution facilities does not exist when applied to all utility-owned property.⁸ Buildings and other land owned by a utility may or may not be used by the utility as a part of its distribution facility. Requiring a utility to allow a telecommunication carrier or cable television system access to utility-owned property not used as part of its distribution system to install lines, cables, ducts, etc. will only increase the expense and congestion associated with distribution, versus utilizing true rights-of-way and other existent facilities.

⁶ 47 U.S.C. § 224(a)(1)

⁷ See *Comments of Kansas City Power & Light Company* at 2 (filed Aug. 27, 1999)

⁸ *Id.*

Additionally, as KCPL points out, there is often little if anything that differentiates utility property from property owned by a non-utility.⁹ A utility-owned office building is virtually indistinguishable from any other office building, save for the name over the door. It would be ludicrous to require that this utility property be subject to access by telecommunication carriers and cable television systems while protecting the rights of the non-utility property owner to choose whether or not to open up its property to telecommunication and cable distribution facilities.

II. WINSTAR MISCONSTRUED CONGRESSIONAL INTENT IN COMMENTING THAT THE COMMISSION MUST INTERPRET SECTION 224 TO ENCOMPASS UTILITY PROPERTY USED IN THE MANNER OF A RIGHT-OF-WAY.

In their Comments to the NPRM, Winstar agrees with the Commission that a right-of-way is equivalent to an easement, and further cites the definition of a right-of-way as “a right to pass over the property of another”.¹⁰ Applying the definition provided by Winstar, and with which Cinergy agrees, to the term “right-of-way” precludes the use of utility-owned property as a right-of-way. Cinergy continues to assert that where the Commission interprets the term “right-of-way” to be synonymous with an easement, it implicitly excludes from the definition of “right-of-way” land that is owned in fee simple absolute because the “right-of-way” would merge with the land owned in fee simple and would be extinguished.¹¹ This merging of interests strongly suggests that property owned in fee simple by a

⁹ *Id.* at 3.

¹⁰ See *Comments of Winstar Communications, Inc.* at 54 (filed Aug. 27, 1999)

utility cannot be brought within the definition of the term “right-of-way”, regardless of how the land is used.

Yet Winstar brashly takes it upon itself to expand this common law definition of right-of-way by citing to *City of Manhattan Beach*.¹² This case held that a right-of-way has a two-fold meaning, including both the right to use the land of another and the specific strip of land used. However, in its desire to find a more expansive definition of right-of-way to suit its purposes, Winstar failed to recognize that *City of Manhattan Beach* limited the latter definition to rights-of-way as applied to *railroads*.

Cinergy has previously brought this distinction to the Commission’s attention in its Comments to the NPRM, citing Black’s Law Dictionary for the proposition that, with the exception of railroads, a right-of-way is the *right to use* the property of another, and does not refer to the land itself.¹³

But perhaps the best argument for not expanding the definition of the term “right-of-way” to include utility-owned property used as a right-of-way is provided by Winstar itself. As Winstar makes evident in its comments, Congress is perfectly capable of achieving the legislative intent it desires through clear statutory language.¹⁴ Had Congress intended the term “right-of-way” to include property used in the manner of a right-of-way, it possessed the wherewithal to do so. The

¹¹ See *Comment of Cinergy Corp.* at 10 (filed Aug. 27, 1999)

¹² See *Comments of Winstar Communication, Inc.* at 56 citing *City of Manhattan Beach v. Sup. Ct. of L.A. County*, 914 P.2d 160, 166 (Ca. 1996)

¹³ See *Comments of Cinergy Corp.* at 9, citing Black’s Law Dictionary at 1326 (6th ed. 1990)

¹⁴ See *Comments of Winstar Communications, Inc.* at 55.

fact that Congress chose not to expand the definition of the term “right-of-way” limits the Commission to applying the common use meaning of the term.

The Commission should not take the bait offered by Winstar, but should apply the elementary tenet of statutory construction that, where not defined in the statute, words are to be given their common use meaning.

III. CINERGY AGREES WITH THE COMMENTS OF AMERICAN ELECTRIC POWER SERVICE CORPORATION, ET AL. THAT REDEFINING THE TERM “RIGHT-OF-WAY” TO INCLUDE UTILITY-OWNED PROPERTY USED IN THE MANNER OF A RIGHT-OF-WAY WILL NOT FURTHER THE COMMISSION’S GOALS.

As presented in the Comments of American Electric Power Corporation and their co-filers, there is nothing to be gained by expanding the use of the term “right-of-way” to include utility-owned property used in the manner of a right-of-way.¹⁵ The Commission’s purpose in issuing the *NPRM* was to improve competitiveness in delivering telecommunication services to multiple tenant environments. In that most utility property, particularly that used in the manner of a right-of-way, is completely outside the realm of multiple tenant environments, the Commission will not advance its objective by granting telecommunication carriers and cable television systems with mandatory access to utility-owned property used in the manner of a right-of-way.

While granting telecommunication carriers and cable television systems access to utility-owned property used in the manner of a right-of-way may reduce the cost associated with building out their distribution networks, it certainly does

little to make them more competitive. Rather, it simply imposes a cost on utility rate-payers. Without the ability to bargain openly with telecommunication carriers and cable television systems, utilities will not be in a position to realize fair market value for the use of their property, and will be forced to pass along the unfavorable economic consequences to their rate payers. This collateral affect of the Commission's proposal can not be justified in light of the sheer lack of competitive enablement that this proposal seeks to provide.

CONCLUSION

WHEREFORE, THE PREMISES CONSIDERED, Cinergy respectfully asks the Commission to act in the public interest in accordance with the proposals set forth herein.

Respectfully submitted,



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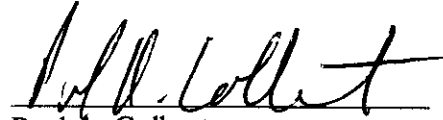
Dated: September 27, 1999

¹⁵

See *Comments of American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation and Southern Company*, at 24 (filed Aug. 27, 1999)

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 1999, I caused true and correct copies of the Reply Comments of the foregoing "Reply Comments of Cinergy Corporation" to be served via hand delivery on:



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